

Memorandum




Subject Draft letter relating to Section 621 of the Treasury, Postal Services and General Government Appropriations Bill	Date SEP - 1 1966
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To

Russell Bruemmer
General Counsel
Central Intelligence Agency

From

John O. McGinnis 
Deputy Assistant Attorney
General
Office of Legal Counsel

Enclosed please find a copy of a draft letter prepared in this office at the request of the White House regarding legislation prohibiting the use or implementation of nondisclosure agreements within the executive branch. The letter is to be sent to the congressional leadership over the signatures of the Attorney General, the Secretaries of State and Defense, the Director of Central Intelligence, and the Assistant to the President for National Security Affairs. The Attorney General has not yet reviewed the draft himself, but I thought that in light of Congress' imminent return it would be useful to obtain your comments. Please direct any questions or comments to me at Room 5233 Main Justice, telephone 633-3657.

The Hon. Robert Byrd
United States Senate
Washington, D.C. 20510

Dear Senator Byrd:

The Treasury, Postal Service and General Government Appropriations Bill for Fiscal Year 1989 contains in section 621 a provision limiting the ability of the President to implement and enforce agreements restricting the disclosure of classified materials by executive branch employees. This provision is identical to Section 630 of Public Law 100-202, the continuing resolution for fiscal year 1988, which was recently declared unconstitutional by the United States District Court for the District of Columbia. Because we believe this provision is both unconstitutional as a legal matter and unwise as a policy matter, we will recommend presidential disapproval of any bill that contains such a provision.

The Supreme Court has explicitly recognized the President's constitutional authority to protect national security information. In Department of the Navy v. Egan, 108 S.Ct. 818 (1988), the Court held that the President's "authority to classify and control access to information bearing on national security ... flows primarily from [the] constitutional investment of power in the President [as Commander in Chief of the Army and

Navy] and exists quite apart from any explicit congressional grant." Id. at 824. Section 621 would severely limit the President's ability to utilize nondisclosure agreements in furtherance of his constitutional authority to protect national security information and therefore unconstitutionally restrict the President's exercise of his Article II powers. As the district court concluded in ruling on an identical provision in this year's continuing resolution, section 621 would "permit the President to ensure the secrecy of national security information only by those means authorized by Congress" and thus "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." National Federation of Federal Employees v. United States, No. 87-2284-OG (D.D.C. May 27, 1988), slip op. at 30.

Besides being unconstitutional, this provision is profoundly unwise. Section 621 would severely hamper the President's ability to prevent unauthorized disclosure of classified information, including information on our most sensitive diplomatic, military, and intelligence activities. No nation can successfully function in the international arena if each of its employees is left free to decide for himself what information is to be disclosed outside the executive branch. Yet section 621 would circumscribe the President's ability to control access to our nation's most sensitive secrets.

We urge that this provision be stricken from the bill in order to preserve the President's authority to protect information vital to our national security.

Sincerely,

George Shultz
Secretary of State

Dick Thornburgh
Attorney General

Frank Carlucci
Secretary of Defense

William Webster
Director of Central Intelligence

Colin Powell
Assistant to the President
for National Security Affairs